Norman bin Ismail v Public Prosecutor

COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO A-05–324–11 OF 2011
BALIA YUSOF, MOHTARUDIN BAKI AND TENGKU MAIMUN JJCA
18 OCTOBER 2013

Criminal Procedure — Defence — Denial — Whether defence of innocent carrier an afterthought — Whether defence never put to prosecution witnesses — Whether version advanced during prosecution case inconsistent with that put forth during defence's case — Whether circumstances gave inference accused knew of drugs — Whether discrepancy in weight of drugs as determined by chemist and as found by police by itself insufficient to create doubt on prosecution case — Whether drug exhibit produced in court same as that recovered by police and that analysed by chemist

The appellant, an Indonesian citizen, was convicted and sentenced to death by the High Court for trafficking in a gross amount of 5,196.07g of cannabis following the Court of Appeal's direction that his defence to the charge be called. That direction came upon the prosecution's successful appeal against the appellant's acquittal at the end of the prosecution case. However, when it called for the defence the trial judge ruled that the question of the appellant's alleged absence of knowledge about the drugs could no longer be raised because the Court of Appeal had held that a prima facie case against the appellant had been established. This ruling by the trial judge was one of three grounds the appellant raised in his instant appeal against conviction and sentence. The other two grounds were that (i) there was unexplained discrepancy in the gross weight of the drugs as found by the chemist, on the one hand, and the investigating officer of the case, on the other, and (ii) the prosecution failure to call as witnesses three other persons ('Mulkar, Muchsin and Ridwan') who were arrested together with appellant warranted the invocation of adverse inference against the prosecution. According to the prosecution evidence, a police party arrested the appellant while he was walking away from a *rumah kongsi* carrying a bag which was found to contain the drugs. The appellant was walking towards a nearby stall where he had minutes earlier been with Mulkar, Muchsin and Ridwan, all of whom also stayed at the same *kongsi*. The trial judge rejected as an afterthought the appellant's defence that he had merely gone back to the *kongsi* to get his cigarettes and, in the process, fulfilled Muchsin's request to bring him his bag from the *kongsi*.

Held, dismissing the appeal:

(1) Although the trial judge erred in ruling that the issue of the appellant's

knowledge of the drugs could no longer be raised at the defence stage in view of the Court of Appeal's holding that a prima facie case had been established, the trial judge did consider the defence of 'innocent carrier' and tested the defence against the prosecution case before concluding that the defence was an afterthought (see paras 13 & 15).

(2) The defence that the bag containing the drugs was not the appellant's and that he was asked by Muchsin to fetch the bag for him from the kongsi was never put to the prosecution witnesses. Instead what was put to them was that the drugs were not in the bag but were found hidden at an electric pole or that the appellant was not holding or carrying any bag when he was arrested. The version advanced during the prosecution case was inconsistent with what was put forth during the defence case. Hence, the court agreed that the defence of 'innocent carrier' was an afterthought. It was reasonable to infer the appellant knew what was inside the bag as he was caught red-handed with it and he struggled while he was being arrested by the police (see paras 17–18).

(3) As the amount of drugs involved exceeded the statutory weight and there was no evidence it was for personal consumption and since possession had been established by direct evidence, the trial judge was entitled to invoke the presumption of trafficking under s 37(da) of the Dangerous Drugs Act 1952 against the appellant (see para 19).

(4) Considering the line of defence put to the prosecution witnesses, that the drugs were not recovered from the appellant but were found hidden by one Halimin at the electric pole, and the finding that the defence of 'innocent carrier' was an afterthought, the court agreed with the trial judge that Mulkar, Muchsin and Ridwan had nothing to do with the charge against the appellant and were not material witnesses and the fact they were not called to testify nor offered for cross-examination could not give rise to adverse inference under s 114(g) of the Evidence Act 1950 (see para 22).

(5) As laid down by the Federal Court in *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636, a difference in the weight of the drug exhibits by itself was insufficient to create a reasonable doubt on the prosecution case. What was more important was whether the exhibit recovered by the police was the same one sent to and examined by the chemist and subsequently produced in court as evidence. From the evidence of the relevant prosecution witnesses there was no doubt the drug exhibit that was seized from the appellant was that sent to the chemist for analysis and was the same one that was produced in court in respect of the charge (see paras 10–11).

[Bahasa Malaysia summary

Perayu, seorang warganegara Indonesia, disabitkan dan dijatuhkan hukuman mati oleh Mahkamah Tinggi kerana mengedar sejumlah kanabis dengan berat

kasar 5,196.07g berikutan arahan Mahkamah Rayuan agar pembelaan bagi pertuduhan tersebut dipanggil. Arahan tersebut dikeluarkan selepas pihak pendakwaan berjaya merayu terhadap pembebasan perayu di akhir kes pendakwaan. Walau bagaimanapun, apabila dipanggil untuk pembelaan, hakim bicara memutuskan bahawa persoalan dakwaan perayu tentang ketiadaan pengetahuan mengenai dadah tersebut tidak boleh dibangkitkan lagi kerana Mahkamah Rayuan telah memutuskan bahawa satu kes prima facie terhadap perayu telah berjaya dibuktikan. Keputusan hakim bicara adalah salah satu daripada tiga alasan yang dikemukakan oleh perayu dalam rayuannya terhadap sabitan dan hukuman ini. Dua lagi alasan lain adalah bahawa terdapat percanggahan yang tidak dijelaskan mengenai berat kasar dadah seperti yang didapati oleh ahli kimia, pada satu pihak, dan pegawai penyiasat kes, pada satu pihak lain; dan (ii) bahawa kegagalan pihak pendakwaan untuk memanggil tiga orang lagi sebagai saksi ('Mulkar, Muchsin dan Ridwan') yang ditahan bersama-sama dengan perayu mewajarkan bangkitan anggapan bertentangan terhadap pihak pendakwaan. Menurut keterangan pihak pendakwaan, pihak polis menangkap perayu ketika dia berlalu pergi dari sebuah 'rumah kongsi' ('kongsi') dengan membawa beg yang didapati mengandungi dadah. Perayu berjalan ke arah gerai berdekatan di mana dia, beberapa minit sebelum itu, telah ke sana bersama Mulkar, Muchsin dan Ridwan, yang mana kesemuanya tinggal di kongsi yang sama. Hakim bicara menolak pembelaan tersebut sebagai satu fikiran semula, bahawa dia sekadar pulang ke kongsi untuk mendapatkan rokoknya dan dalam proses tersebut, memenuhi permintaan Muchsin untuk mengambil begnya daripada kongsi.

Diputuskan, menolak rayuan:

(1) Walaupun hakim bicara terkhilaf dalam memutuskan isu mengenai pengetahuan perayu tentang dadah tersebut tidak boleh dibangkitkan lagi pada peringkat pembelaan kerana Mahkamah Rayuan telah memutuskan bahawa satu kes prima facie telah dibuktikan, hakim bicara tidak mempertimbangkan pembelaan pembawa tidak bersalah dan menguji pembelaan tersebut terhadap kes pendakwaan sebelum memutuskan bahawa pembelaan tersebut adalah satu fikiran semula (lihat perenggan 13 & 15).

(2) Pembelaan bahawa beg yang mengandungi dadah tersebut bukan milik perayu dan bahawa dia diminta oleh Muchsin untuk mengambil beg tersebut untuknya daripada kongsi tidak diajukan kepada saksi-saksi pendakwaan. Sebaliknya, yang diajukan kepada mereka adalah bahawa dadah tersebut bukan berada dalam beg tetapi dijumpai disorokkan pada tiang elektrik atau bahawa perayu tidak memegang atau membawa apa-apa beg ketika dia ditangkap. Versi yang dikemukakan ketika kes pendakwaan bercanggah dengan apa yang dikemukakan ketika kes pembelaan. Oleh itu, mahkamah bersetuju bahawa pembelaan pembawa

tidak bersalah adalah satu fikiran semula. Adalah munasabah untuk membuat kesimpulan bahawa perayu tahu apa dalam beg tersebut kerana dia ditangkap membawanya dan dia bergelut ketika ditangkap oleh polis (lihat perenggan 17–18).

(3) Oleh kerana jumlah dadah yang terlibat melebihi berat statutori dan tiada keterangan bahawa ia adalah untuk kegunaan peribadi dan memandangkan milikan telah dibuktikan melalui keterangan langsung, hakim bicara berhak membangkitkan anggapan pengedaran di bawah s 37(da) Akta Dadah Berbahaya 1952 terhadap perayu (lihat perenggan 19).

(4) Memandangkan pembelaan diajukan kepada saksi-saksi pendakwaan, bahawa dadah tersebut tidak didapati daripada perayu tetapi dijumpai disorokkan oleh seorang yang bernama Halimin pada tiang elektrik dan dapatan bahawa pembelaan pembawa tidak bersalah adalah satu fikiran semula, mahkamah bersetuju dengan hakim bicara bahawa Mulkar, Muchsin dan Ridhwan tiada kaitan dengan pertuduhan terhadap perayu dan bukanlah saksi-saksi material dan fakta bahawa mereka tidak dipanggil untuk memberi keterangan mahupun ditawarkan bagi pemeriksaan balas tidak boleh membangkitkan anggapan bertentangan di bawah s 114(g) Akta Keterangan 1950 (lihat perenggan 22).

(5) Seperti yang diputuskan oleh Mahkamah Persekutuan dalam kes *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636, perbezaan dalam berat ekshibit-ekshibit dadah dengan sendirinya tidak mencukupi untuk membangkitkan keraguan munasabah ke atas kes pendakwaan. Apa yang lebih penting adalah sama ada ekshibit yang didapati oleh pihak polis adalah sama dengan yang dihantar dan dianalisis oleh ahli kimia dan seterusnya dikemukakan di mahkamah sebagai keterangan. Berdasarkan keterangan saksi-saksi pendakwaan yang relevan, tiada keraguan bahawa ekshibit dadah yang dirampas daripada perayu adalah yang sama dengan yang dihantar kepada ahli kimia bagi analisa dan adalah yang sama dengan yang dikemukakan di mahkamah berhubung pertuduhan (lihat perenggan 10–11).]

Notes

For cases on denial, see 5(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1912–1914.

Cases referred to

Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)

Hasbala Mohd Sarong v PP [2013] 6 MLJ 636, FC (refd)

Megat Halim Megat Omar v PP [2008] MLJU 647; [2009] 1 CLJ 154, CA (refd)

Munusamy v PP [1987] 1 MLJ 492, SC (refd)

Nik Asmawi bin Nik Daud v PP [2010] 5 MLJ 652; [2010] 6 CLJ 400, CA (refd)
Parlan bin Dadeh v PP [2008] 6 MLJ 19; [2009] 1 CLJ 717, FC (refd)
PP v Chia Leong Foo [2000] 6 MLJ 705; [2000] 4 CLJ 649, HC (refd)
Tan Kim Ho & Anor v PP [2009] 3 MLJ 151; [2009] 3 CLJ 236, FC (refd)
Wong Swee Chin v PP [1981] 1 MLJ 212, FC (refd)
Zaifull bin Muhammad v PP and another appeal [2013] 2 MLJ 348; [2013] 2 AMR 346, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37(da), 39B(1)(a), (2)
Evidence Act 1950 s 114(g)

Appeal from: Criminal Appeal No 45–25 of 2003 (High Court, Ipoh)

Choong Kak Sen (Gooi & Azura) for the appellant.
Kwan Li Sa (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Tengku Maimun JCA:

[1] The appellant was charged for an offence of trafficking in dangerous drugs under s 39B(1)(a) of the Dangerous Drugs Act 1952 and punishable under s 39B(2) of the same Act.

[2] The case for the prosecution is as follows. Acting on information received, on 20 May 2001, ASP Elias bin Abu Bakar ('SP5') and a team of 14 other policemen went to Kg Tersusun Tronoh Mines, Tronoh ('Kg Tersusun'). Upon arrival at the targeted area at about 8.30pm, SP5 and his team members took their positions and kept the area under surveillance. At about 9.30pm, four men were seen walking from the direction of Kg Tersusun heading towards Jalan Besar Ipoh — Lumut towards a stall. At about 10 minutes later, one of the four men ('subsequently identified as the appellant') walked back towards Kg Tersusun, heading towards a *rumah kongsi*. The appellant came out from Kg Tersusun about 5 minutes later, holding a bag in his left hand.

[3] SP5 and SP6 who were hiding behind the bushes during the surveillance came out and apprehended the appellant. SP5 examined the bag where he found five compressed slabs of dried leaves. Upon analysis by the chemist ('SP4'), the dried leaves were found to be cannabis. The other three men who were seen walking with the appellant earlier were also arrested by the police when they were about to leave the stall. The three were identified as Mulkar, Muchsin and Ridwan bin Abdul Rahman ('Ridwan'). All three and the appellant are Indonesian citizens.

[4] At the close of the prosecution case, the learned judicial commissioner found that the prosecution had failed to prove a prima facie case against the appellant. The appellant was acquitted and discharged. Dissatisfied with the decision of the learned judicial commissioner, the prosecution appealed to the Court of Appeal. The appeal by the prosecution was allowed. The case was remitted to the High Court for the defence to be called before the same learned judicial commissioner.

[5] The appellant gave evidence on oath. The appellant states that he lived at the rumah kongsi together with Ridwan, Shukri and Mulkan. The appellant further states 'Pada hari kejadian, saya kenal dengan seorang bernama Muchsin. Dia tidak tinggal dengan kami di kongsi … Pada pukul lebih kurang 9.30 malam, Ridwan, Muchsin dan Mulkan ajak saya pergi ke sebuah gerai yang terletak lebih kurang 70-80 meter dari rumah kongsi … Kami ke gerai untuk minum dan sembang-sembang. Sampai di gerai, semasa sedang minum, saya dapat tahu yang Muhsin akan balik ke Ipoh dan akan bawa passport Ridzwan dan Mulkan untuk tujuan cop passport yang tamat tempoh. Lebih kurang 10–15 minit, saya beritahu 3 kawan lagi yang saya nak balik ke kongsi untuk mengambil rokok, rokok saya tertinggal. Semasa saya bangun, Muchsin telah meminta saya ambil begnya di kongsi kami, yang terletak di bahagian belakang pintu. Saya pun berjalan kaki balik ke kongsi berseorangan. Sampai di rumah kongsi tiada sesiapa pun di rumah walaupun Shukri. Saya ambil rokok saya dan tengok belakang pintu ada sebuah beg, beg yang Muchsin katakan … saya ambil beg dan keluar daripada kongsi …'

[6] The learned judicial commissioner dealt with the defence as follows:

> Mahkarmah ini sedar bahawa tugas pembelaan adalah untuk hanya menimbulkan keraguan yang munasabah ke atas kes pendakwaan. Sekiranya diteliti keterangan pembelaan, ianya lebih mirip kepada dalihan 'innocent carrier' yang tidak mengetahui apa-apa tentang kandungan beg celoreng itu. Tertuduh dikatakan membawa beg itu atas permintaan kawannya. Tetapi setelah Mahkamah Rayuan memerintahkan tertuduh mengemukakan pembelaannya tempoh hari, saya berpendapat bahawa isu pengetahuan terhadap barang kes tidak lagi timbol memandangkan Mahkamah Rayuan telah pun memutuskan bahawa satu kes prima facie telah pun dibuktikan terhadap tertuduh.
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> Isu rokok tidak seharusnya ditimbulkan sekali lagi diperingkat pembelaan ini kerana tiada dalam keterangan mana-mana saksi di peringkat kes pendakwaan yang mengatakan bahawa ada kotak rokok yang didapati daripada tertuduh di malam kejadian di masa tertuduh ditangkap.
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> Alasan mengambil rokok juga tidak munasabah kepada saya kerana jenis rokok yang dimaksudkan oleh tertuduh boleh didapati dari rakan-rakan serumahnya yang sama-sama perokok, berada digerai berkaitan. Lagipun dalam keterangannya tertuduh mengatakan yang mereka berada digerai itu antara 1/2 jam ke 1 jam

A selalunya. Tak mungkin rasanya tertuduh setelah beberapa lama di situ berpatah balik ke kongsinya semata-mata untuk mengambil rokoknya, untuk berada sekejap sahaja lagi di gerai itu kemudiannya.

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Sebagai kesimpulannya, setelah saya menimbangkan pembelaan tertuduh dan meneliti semula kes prima facie pendakwaan, saya berpuashati bahawa pihak pendakwaan telah membuktikan kesnya melampaui keraguan yang munasabah setelah tertuduh gagal untuk menimbulkan keraguan yang munasabah.

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[7] The appellant was thus convicted and sentenced to death. Hence the appeal before us where the appellant raised the following grounds:

(a) Discrepancy in the gross weight of the drugs;

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(b) Whether the appellant had the mens rea possession of the drugs; and

(c) Adverse inference for not calling three material witnesses.

We had unanimously dismissed the appeal. We now give our reasons.

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DISCREPANCY IN THE GROSS WEIGHT OF THE DRUGS

[8] The evidence of SP4 was that the total gross weight of the five slabs was 5196.07g. The investigating officer ('SP9') said the gross weight of the drugs was 5kg. It was the submission of learned counsel for the appellant that by the time the drugs reached SP4, it had increased by 196.07g and that there was no explanation given by the prosecution to bridge this gap. It was thus contended for the appellant that the discrepancy with regards to the gross weight of the drugs had resulted in a reasonable doubt on the identity of the drug exhibit.

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[9] Learned counsel for the appellant cited *Zaifull bin Muhammad v Public Prosecutor and another appeal* [2013] 2 MLJ 348; [2013] 2 AMR 346 where the Federal Court held that it is incumbent on the prosecution to offer some explanation for the discrepancies and that the unexplained discrepancies on the gross weight of the drugs had created a reasonable doubt as to the identity of the drug exhibit.

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[10] Subsequent to *Zaifull*, the Federal Court in the case of *Hasbala Mohd Sarong v Public Prosecutor* [2013] 6 MLJ 636 (Criminal Appeal No 05–87–05 of 2012) had considered similar issue relating to discrepancy in the gross weight of the drug exhibits as found by the chemist and the investigating officer. On the facts and circumstances of the case, the Federal Court in *Hasbala* dismissed the appeal and affirmed the conviction and sentence passed against the appellant, having found that the difference in the weight of the drugs had not

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created a reasonable doubt on the prosecution's case. Learned counsel submitted that *Hasbala* had not overruled *Zaifull* and urged us to follow *Zaifull*. As there was no explanation in the instant case as to the discrepancy in the weight, it was submitted by learned counsel that the appellant should have been discharged and acquitted on this ground alone.

[11] The principle that can be gathered from the judgment of the Federal Court in *Hasbala* is that the difference in the weight of the drug exhibits by itself is not sufficient to create a reasonable doubt on the prosecution's case. What is more important is whether the exhibit recovered by the police is the same exhibit sent to and examined by the chemist and subsequently produced in court as evidence. Reverting to the instant case, having perused the evidence of SP5, SP9, SP4 and the storekeepers SP2 and SP1, we have no doubt that the drug exhibit seized from the appellant and sent to SP4 for analysis is the same exhibit as that found to be cannabis and produced in court for which the appellant was charged with trafficking.

WHETHER THE APPELLANT HAD THE MENS REA POSSESSION OF THE DRUGS

[12] This ground on mens rea possession is tied up to the issue raised by the appellant that the learned judicial commissioner had erroneously rejected the defence instead of re-evaluating the whole evidence in totality.

[13] The defence of the appellant was that he did not have any knowledge of the nature of the incriminating substance found in the bag which he was carrying at the material time. The complaint by the appellant was that the learned judicial commissioner had erred in His Lordship's approach in rejecting the appellant's claim of lack of knowledge on the basis that the Court of Appeal had, in ordering the appellant to enter his defence, held that a prima facie case had been proven against the appellant, hence the issue of knowledge does not arise at the defence case.

[14] It is the duty of the defence to rebut the element of knowledge and the court is incumbent to re-evaluate all the evidence adduced in the course of the hearing, inclusive of that adduced by the prosecution (see *Nik Asmawi bin Nik Daud v Public Prosecutor* [2010] 5 MLJ 652 ; [2010] 6 CLJ 400). In this regard, we noted that the learned judicial commissioner had erred in making the remarks '… setelah Mahkamah Rayuan memerintahkan tertuduh mengemukakan pembelaannya tempoh hari, saya berpendapat bahawa isu pengetahuan terhadap barang kes tidak lagi timbol memandangkan Mahkamah Rayuan telah pun memutuskan bahawa satu kes prima facie telah pun dibuktikan terhadap tertuduh'.

[15] Be that as it may, reading the full grounds of judgment of the learned judicial commissioner, we find that the learned judicial commissioner had considered the defence of innocent carrier where the appellant had attempted to negate the element of knowledge and we find that the learned judicial commissioner had tested the defence against the prosecution's case in coming to the conclusion that the defence was an afterthought.

[16] Although there is no burden on the appellant to prove his innocence, it is trite that the appellant ought to put his line of defence during the prosecution's case (see *Wong Swee Chin v Public Prosecutor* [1981] 1 MLJ 212; *Tan Kim Ho & Anor v Public Prosecutor* [2009] 3 MLJ 151; [2009] 3 CLJ 236). Failure to do so will render the defence being labelled as one of a recent invention or an afterthought (see *Megat Halim Megat Omar v Public Prosecutor* [2008] MLJU 647; [2009] 1 CLJ 154).

[17] The defence that the bag was not the appellant's and that the appellant was asked by Muchsin to fetch the bag which contained the drugs from the rumah kongsi was not put to the prosecution's witnesses. In fact, during cross-examination of SP5, what was put to him was that the drugs were not found in the bag but that the drugs were found at 'tiang elektrik' hidden by one Halimin prior to the surveillance by the police (see appeal record Vol 1 pp 81, 82). Similarly, during cross-examination of SP6, that the bag was Muchsin's was not put to SP6. What was put to SP6 was that when the appellant was arrested, the appellant was not holding or carrying any bag (AR 1:100). The appellant had given an inconsistent version at the prosecution and defence case. Having perused the record of appeal, we find no error in the approach taken by the learned judicial commissioner and we agree with the learned judicial commissioner that the defence of innocent carrier was an afterthought.

[18] Mens rea possession requires proof of knowledge. It is settled that knowledge could not be proved by direct evidence but by inference from surrounding circumstances and that conduct is highly material for purposes of drawing an inference on knowledge (see *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237; *Parlan bin Dadeh v Public Prosecutor* [2008] 6 MLJ 19; [2009] 1 CLJ 717). In the instant case, it is reasonable to draw an inference that the appellant knew what was inside the bag that he was carrying. The appellant was caught red handed carrying the bag containing cannabis. The appellant had struggled with the police when he was being arrested.

[19] Further, the quantity of the drugs recovered exceeded the statutory weight. The amount is not small and it could not have been intended for personal consumption. Indeed the appellant did not give evidence that the cannabis was for his own consumption. Since possession had been established by direct evidence, the learned judicial commissioner was entitled to invoke the

presumption of trafficking under s 37(da) of the Act against the appellant.

WHETHER THE PROSECUTION'S FAILURE TO CALL AND/OR TO OFFER FOR CROSS-EXAMINATION OF THREE WITNESSES WARRANTS THE INVOCATION OF S 114 (G) OF THE EVIDENCE ACT 1950

[20] It is not in dispute that Mulkar, Muchsin and Ridwan were arrested with the appellant on the night in question. Three passports belonging to them were also recovered by the police from inside the bag. The defence case was that the bag belonged to Muchsin as Muchsin was the one who had requested the appellant to take the bag from the *rumah kongsi* and that Muchsin would be going to Ipoh and would be bringing along the passports of Mulkar and Ridwan for stamping. The defence submitted that Mulkar, Muchsin and Ridwan were material witnesses and their non-calling by the prosecution warrants the invocation of an adverse inference against the prosecution under s 114(g) of the Evidence Act 1950. *Public Prosecutor v Chia Leong Foo* [2000] 6 MLJ 705 ; [2000] 4 CLJ 649 and *Nik Asmawi bin Nik Daud v Public Prosecutor* [2010] 5 MLJ 652 ; [2010] 6 CLJ 400 were cited in support thereof.

[21] The finding of the learned judicial commissioner on this issue is reproduced below:

> … isu ketidakpanggilan kawan-kawannya yang lain di peringkat kes pendakwaan bukanlah isu lagi setelah diputuskan oleh Mahkamah Rayuan, tiada inferensi sebaliknya kepada isu ini. Tiada perkaitan langsung kawan-kawannya dengan kesalahan yang tertuduh hadapi. Oleh yang demikianlah saya mendapati apa-apa perkaitan antara tertuduh dengan kawannya, sama ada dia meletakkan punca perbuatannya kepada kawannya itu, saya katakan adalah suatu perkara yang disifatkan sebagai 'afterthought'.

[22] Having regard to the fact that the line of defence put to the prosecution witnesses was that the drugs were not recovered from the hands of the appellant but were found hidden by one Halimin at the 'tiang elektrik' and that the defence of an innocent carrier was an afterthought, we agree with the learned judicial commissioner that Mulkar, Muchsin and Ridwan have nothing to do with the charge that the appellant was facing. In the circumstances, Mulkar, Muchsin and Ridwan are not material witnesses and the fact that they were not called by the prosecution to testify nor offered for cross-examination cannot give rise to an adverse inference under s 114(g) of the Evidence Act 1950 (see *Munusamy v Public Prosecutor* [1987] 1 MLJ 492).

[23] Looking at the evidence in totality, we agree with the learned judicial commissioner that the defence failed to raise a reasonable doubt on the

A prosecution's case. We are satisfied that the conviction of the appellant is safe. We therefore unanimously dismissed the appeal and affirmed the conviction and sentence imposed by the High Court.

Appeal dismissed.

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Reported by Ashok Kumar

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